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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1635

STATE OF SOUTH DAKOTA,

Petitioner,

vs.

CECIL D. ANDRUS, et al.,

Respondents.

RESPONDENT PITTSBURGH PACIFIC COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner contends that the United States Department of Interior is required by §102(2)(C) of the National Environmental Policy Act, 42 U.S.C. §4332(C) (hereinafter referred to as "NEPA") to file an Environmental Impact Statement (hereinafter referred to as "EIS") prior to the issuance of a mineral patent under the General Mining Act of 1872, 30 U.S.C. §21 et seq.

The United States District Court for the State of South Dakota rejected the contention of the Petitioner and held that an EIS was not required prior to the issuance of a mineral patent under The General Mining Act of 1872, 30 U.S.C. §21 et seq. (Petitioner's Appendix 19-hereinafter

referred to as "P.A."). The United States Court of Appeals for the Eighth Circuit affirmed the decision of the District Court (P.A. 9), holding that the issuance of a mineral patent does not constitute a "major federal action" under NEPA and that an EIS is therefore not required prior to issuance of a patent.

STATEMENT OF THE CASE

Pittsburg Pacific Company (hereinafter referred to as "Pittsburgh Pacific") filed an application under The General Mining Act of 1872, 30 U.S.C. §21 et seq., for a mineral patent to twelve contiguous twenty-acre mining claims located within the Black Hills National Forest in South Dakota. (P.A. 10). These applications were based upon the discovery of taconite or iron ore within the mining claims. The Bureau of Land Management, at the request of the United States Forest Service, contested said applications. (P.A. 10).

The administrative law judge denied the contest to the patents and found that Pittsburgh Pacific was entitled to a mineral patent for all twelve claims. (P.A. 10-11). The Bureau of Land Management appealed the decision of the administrative law judge to the Interior Board of Land Appeals. At that point, the State of South Dakota (hereinafter referred to as "State") and the American Mining Congress were allowed to appear as amicus curiae. (P. A. 11). The State was subsequently allowed to intervene as a party to the contest. (P.A. 46).

The Interior Board of Land Appeals set aside the decision of the administrative law judge and remanded the matter for further hearing on, among other things, the

availability and cost of land, water, and other resources necessary to mining the claimed discoveries. Pittsburg has requested early trial of these issues.

In addition, the Interior Board of Land Appeals rejected the contention of the State that an EIS was required prior to the issuance of a mining patent by the Department of Interior. The State then commenced this independent action, the decision in which appears at P.A. 19. The federal defendants and Pittsburgh Pacific moved to dismiss the Complaint of the State contending that an EIS is not required inasmuch as the issuance of a mineral patent is a ministerial act and does not constitute a major federal action under NEPA. District Court Judge Andrew W. Bogue in affirming the I.B.L.A. decision, held that:

> In the instant case, the receipt of a patent from the federal government is not a condition precedent to the commencement of mining activities. Plaintiff argues strenuously that this Court should consider the difficulty which the private defendants will have in obtaining financing without a patent for their claims. This practical consideration is not controlling where the legal rights of the locator are clear. While the mineral patent would be of considerable value to the claimant, it is not a necessity for the claimant to have a mineral patent before beginning to extract minerals and, concomitantly, affect the quality of the human environment.
>
> Under these circumstances, this Court cannot find that the initial agency decision not to prepare an environmental impact statement was unreasonable. In acting upon a mineral patent application, the agency is involved in a nondiscretionary activity of evaluating a property interest which does not permit the consideration of environmental factors. Any EIS

> would therefore be of minimal value. Furthermore, as a claimant can begin to extract minerals without a mineral patent, the granting of a mineral patent is not a major federal action significantly affecting the quality of the human environment. *South Dakota vs. Andrus,* 468 F.Supp. 905 (1978) (P.A. 29-30).

The United States Court of Appeals for the Eighth Circuit affirmed the District Court decision. The Court noted that ministerial or non-discretionary acts have generally been held outside the scope of NEPA's EIS requirements. It stated that "it is at least doubtful that the Secretary's non-discretionary approval of a mining patent constitutes an 'action' under §102(2)(C) (of NEPA)." (P.A. 15). The Court of Appeals held, however, that even if a ministerial act may *in some instances* fall within §102(2)(C), the mere granting of a mineral patent does not enable the party to mine, and the issuance of a mineral patent is not a 'major' federal action under the statute. Therefore, they held that no EIS was required at the present time, and left for later determination whether an EIS would be required prior to actual mining. ". . . [T]his is not to say that at some later date an EIS will not be required." (P.A. 17)

REASONS FOR REFUSING THE WRIT

The decision of the Court of Appeals affirming that of the United States District Court and that of the Interior Board of Land Appeals wherein it was held that the ministerial or non-discretionary act of issuing a mineral patent by the Secretary of the Department of Interior is not a major federal action under NEPA and that an EIS is

therefore not required is correct. There is no conflict between the Circuit Courts of Appeal concerning this issue that needs to be resolved by the Court. Likewise, contrary to what Petitioner urges, it is neither necessary nor proper for the Court to look beyond the *specific* issue involved here, (which concerns the issuance of a mineral patent), and to consider *generally* whether ministerial or non-discretionary acts are outside the scope of NEPA's EIS requirements. The only issue involved in this case is whether an EIS is required prior to the particular ministerial act of issuing a mineral patent by the Secretary of the Department of Interior. Every tribunal and court decision found on this specific issue has held that an EIS is not required prior to the issuance of a patent. Those decisions are correct for the reasons hereinafter set forth.

1. *Issuance of a Mineral Patent is a Ministerial Act.* Issuance of a mineral patent is a ministerial act and therefore outside the ambit of NEPA's EIS requirements. It is clear that once an applicant has found a mineral deposit sufficient in quality and quantity that it can be marketed at a profit, considering the sales price of the product and the cost of getting it to market in a saleable shape, the statutory requirements of The General Mining Act of 1872, 30 U.S.C. §21 et seq. have been met and the patent must issue so long as he is in compliance with the other incidental requirements of the mining law. The applicant is, at that juncture, *entitled* to the patent. 30 U.S.C. §29. (P.A. 5-6). The Secretary is given no discretion nor decision-making power in the matter. He must issue the patent. As was stated by the United States Supreme Court:

> "[W]here minerals have been found and the evidence is of such a character that a person of ordi-

> nary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. *Castle vs. Womble,* 19 L.D. 455, 457 (1894)." *Crisman vs. Miller,* 197 U.S. 313, 322 (1905). See, also, *Best vs. Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1963).

As properly noted by the Court of Appeals, ministerial acts such as issuing a mineral patent are outside the scope of NEPA's EIS requirements because the government official carrying out such an act has no discretion or decision-making power which an EIS could properly influence. Consequently, preparation of an EIS would be a futile act.

> "Ministerial acts, however, have generally been held outside the ambit of NEPA's EIS requirement. Reasoning that the primary purpose of the impact statement is to aid agency decision making, courts have indicated that non-discretionary acts should be exempt from the requirement. *N.A.A.C.P. vs. Medical Center, Inc.*, 584 F.2d 619, 634 (2d Cir. 1978); *Monroe County Conservation Council, Inc. vs. Volpe,* 472 F.2d 693, 697 (2d Cir. 1972); *Environmental Defense Fund, Inc. vs. Corps of Engineers of U.S. Army*, 470 F.2d 289, 294 (8th Cir. 1972), cert. den. 412 U.S. 931 (1973); *Calvert Cliffs' Coordinating Committee, Inc. vs. A.E.C.*, 449 F.2d 1109, 1114 (D.C. Cir. 1971)." *State of South Dakota vs. Andrus et al.*, Slip Op. No. 79-1178 at 6 & 7 (8th Cir. 1980). (P.A. 14).

2. *Issuance of a Mineral Patent is Not a Major Federal Action.* Even if ministerial actions may in some instances come within the parameters of NEPA's EIS re-

quirements, issuance of a mineral patent is not such an action. Under NEPA, an EIS is required only if a particular agency's action is a "*major* federal action significantly affecting the quality of the human environment." 40 U.S.C. §4332(C). Issuance of a mineral patent is not such a "major" federal action.

The issuance of a patent has no effect whatsoever on the right to extract and market a mineral deposit, and is not a condition precedent to actual mining. Issuance of a mineral patent merely conveys to the applicant legal title to the mineral deposit and firmly establishes the applicant's possessory right to it. Permits and licenses, State and Federal, required for the mining operation may or may not require one or more EIS, depending upon the statute or regulation involved. As stated by the Court of Appeals:

> [I]n the instant case, *the granting of a mineral patent does not enable the private party, Pittsburgh, to do anything.* Unlike the cases where a lease, permit or license is required before the particular project can begin, the issuance of a mineral patent is *not a precondition* which enables a party to begin mining operations. 30 U.S.C. 26 . . .
>
> In light of the fact that a mineral patent *in actuality is not a federal determination which enables the party to mine,* we conclude in the present context that the granting of such a patent is not a "major" federal action within the meaning of §102(2)(C). (P.A. 16-17)

Whether or not the issuance of a mineral patent may ease the burden of obtaining financing for the mining operation is irrelevant to the issue at hand, contrary to

what the State argues, when determining whether the issuance of a mineral patent is a "major" federal action under NEPA. A patent is not required for or otherwise *legally* connected to actual mining and it is the actual mining that has the impact, if any, upon the environment.

3. *NEPA Conflicts with and is Therefore Superseded by The General Mining Act.* If the Secretary of the Department of Interior were required to prepare an EIS prior to the issuance of a mineral patent it would also be contrary to the principle recently set down by this Court in the case of *Flint Ridge Development Co. vs. Scenic Rivers Association,* 426 U.S. 776, 96 S.Ct. 2430, 49 L. Ed.2d 205 (1976). In *Flint,* the Court was faced with a similar type of conflict between NEPA and another federal statute. The State alleges in its Petition that the *Flint* decision left unanswered a question that is germane to our case. (P.A. 6). On the contrary, this Court in *Flint* squarely addressed the specific issue before it by holding that NEPA must give way to the federal statute under such circumstances.

The statute at issue in *Flint* was the Interstate Land Sales Act. That Act dictated that a "statement of record" disclosing, among other things, the state of title, nature of the improvements, and proposed plans for land development be filed by a land developer prior to the sale of a parcel of land. Such a statment was to automatically become effective within thirty (30) days after it was filed and only thereafter could sales of land be consummated. The Secretary had no authority to reject the statement once it was shown to be accurate on its face. It was obvious that since it would take much longer than thirty

(30) days to prepare an EIS, if NEPA was going to be applied and an EIS statement required the Court in essence would be amending the Interstate Land Sales Act. If an EIS were required, the "statment of record" would no longer automatically become effective after the expiration of thirty (30) days and sales of land would be delayed for a substantial period of time. Such a result was unacceptable to this Court.

> In sum, even if the Secretary's action in this case constituted major federal action significantly affecting the quality of the human environment so that an Evironmental Impact Statement would ordinarily be required, there would be a clear and fundamental conflict of statutory duty. The Secretary cannot comply with her duty to allow statements of record to go into effect within thirty (30) days of filing, absent in accurate and incomplete disclosure and simultaneously prepare impact statements on proposed developments. Under the circumstances, we find that NEPA's impact statement requirement is inapplicable. *Flint Ridge Development Co. vs. Scenic Rivers Association*, 426 U.S. 776, 791, 96 S.Ct. 2340, —, 49 L.Ed.2d 205, 218 (1976).

Likewise, in the present case the Secretary of the Department of Interior is statutorily required to issue a mineral patent to an applicant after the applicant has made a showing that the mineral deposit can be mined with a reasonable expectation of making a profit. The mere issuance of a mineral patent, giving the applicant title to the property, has no environmental significance. Requiring an EIS at this state would not only cause unwarranted and unnecessary delay in the mineral

patent process, but would also inject a host of unrelated, irrelevant, and inadmissible statements and factors into the non-discretionary actions of the Secretary. An EIS requirement would be in direct conflict with and would in effect amend The General Mining Act and, as this Court held in *Flint,* supra, the conflict must be resolved by the giving way of NEPA to the statute.

4. *Concerns of the State are Outside of the Secretary's Reach in Issuing a Mineral Patent.* The State's public policy argument that an EIS should be required because it would be beneficial to the government and to the public is completely without merit under the circumstances. The State argues that preparation of an EIS would help determine whether the federal government should contest a particular patent application. (Petition 8-9-hereinafter referred to as "Pet.") Petitioner also argues that an EIS would assist the State in determining whether to issue its own various permits to the mining operation (Pet. 9); would facilitate cooperation between federal and state governments (Pet. 9-10); and would foster public debate on the relevant issues (Pet. 10).

Whether an EIS would bring about such results is speculative at best. What is certain, however, is the fact that such concerns are immaterial and irrelevant under the mineral patent process of The General Mining Act of 1872. 30 U.S.C. §21 et seq. Such concerns are not to be considered by the Secretary as he goes about the judicial task of determining whether the applicant has proven that he has made a "discovery" and is therfore entitled to a mineral patent. The scope of his inquiry is limited by The General Mining Act to determining whether the mineral

a profit. If it can, the patent must issue. Consideration of potential environmental impact in the mineral patent process would be unlawful and would also invade the later functions of the other governmental agencies such as the granting of permits by the U.S. Forest Service.

CONCLUSION

Pittsburgh Pacific does not contend that an EIS may never be required. Rather, it contends that the issuance of a mineral patent is not the point at which an EIS is required, and four basic reasons support that position.

First, issuance of a mineral patent is a ministerial act and ministerial acts are outside the ambit of NEPA's EIS requirements.

Secondly, even if certain ministerial acts may fall within the scope of NEPA's EIS requirements, issuance of a mineral patent is not such an act inasmuch as it does not constitute "major" federal action significantly affecting the quality of human environment. The impact upon the environment which a mining operation may have, if any, results from the actual mining, extraction and marketing, of the mineral deposit. Acutal mining is not in any manner dependent upon the issuance of a patent. Issuance of a patent merely conveys legal title to the applicant to the mineral deposit and firmly establishes his possessory rights thereto.

Thirdly, an EIS should not be required in the present case because it would violate the principle set down by this Court in the *Flint* case, supra, where it was held that NEPA must give way when it conflicts with other statutory requirements such as The General Mining Act of 1872 in our case.

Finally, the public policy concerns expressed by the State in support of their contention that an EIS statement is required are not at issue when the Secretary is involved in the mineral patent process, and such matters are not to be considered by him.

It is therefore respectfully submitted that the Petition for Certiorari be denied. Petitioner's reference to *United States v. New Mexico,* 438 U.S. 696, 98 S.Ct. 3012 (1978), and *Andrus v. Sierra Club,* 99 S.Ct. 2335 (1979), we do not consider applicable to the situation presented by the present application.

Dated this 9 day of May, 1980.

Respectfully submitted,

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